

September 5, 2006

Civil Division-Kent County (739-7641)

Mr. Mark G. Schaeffer
545 Kates Way
Smyrna, DE 19977

**Re: Freedom of Information Act Complaint
Against Town of Smyrna**

Dear Mr. Schaeffer:

Our Office received your complaint on July 6, 2006 alleging that the Town of Smyrna ("the Town") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), by: (1) not giving timely notice to the public of a special meeting of the Town Council held on May 18, 2006; and (2) not disclosing in the agenda for the special meeting that the Council would discuss appointing a Vice Mayor.¹

By letter dated July 12, 2006, we asked the Town to respond to your complaint by July 21, 2006. We granted the Town's request for an extension of time until August 7, 2006 to allow the Council to meet and decide whether the Town Solicitor or other legal counsel should respond to your complaint. On August 8, 2006, the Town Solicitor advised that the Town Manager would respond to your complaint and asked for an extension of time until August 14, 2006, which we

¹ You also allege that the Town's May 18, 2006 special meeting violated the municipal charter, but that claim is outside our jurisdiction under FOIA.

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granted. We received the Town Manager's response on August 11, 2006. By letter dated August 17, 2006 you commented on the Town's response.

The Town provided us with the agenda for the Council's May 15, 2006 regular meeting. The agenda listed under "OLD BUSINESS" the appointment of: "(1) Council Secretary (2) Vice-Mayor (3) Standing Committees."

The Town provided us with the minutes of the Council's May 15, 2006 meeting. The minutes reflect that the Council appointed Memphis Evans as Council Secretary. The Council then discussed the appointment of a Vice Mayor. You made a motion to appoint William Pressley as Vice Mayor but the "[m]otion failed with Mayor Schaeffer and Councilman Pressley voting for, Councilperson White, Councilmen Cahill, Chevernak, and Mullen voting against, and Councilman Evans not voting."

The minutes of the May 15, 2006 meeting show that the Council then discussed appointments to standing committees. "Councilman Cahill stated that the Mayor has not shared his list of standing committee appointments. He said he feels there should be a special meeting held in order to get the standing committees appointed so that business can be done." The Council approved a motion "to request the Mayor to provide the list of standing committee members prior to the special meeting and to provide the list to [the Town Manager] in the morning."

The Town provided us with the agenda and minutes for the May 18, 2006 special meeting of the Council. The Town posted the agenda at 2:30 p.m. on May 16, 2006. The agenda listed under " OLD BUSINESS: . . . I. Appointment of Standing Committees." The agenda did not mention the Vice Mayor position.

The minutes of the Council's May 18, 2006 special meeting reflect that the "meeting was

called to order at 7:30 p.m. by Councilman Memphis Evans. Mayor Schaeffer was excused for this meeting. Councilpersons present were A. Douglas Chevernak, Gene A. Mullen, William D. Pressley Sr., Valerie M. White, and Patrick J. Cahill." ² The minutes show that the Council discussed appointments to standing committees and then voted 5-0 (with one abstention) "to accept the list of standing committee appointments as just read by Councilman Mullen."

The minutes of the May 18, 2006 special meeting show that the Council then discussed the appointment of a Vice Mayor under the agenda item "Other Council Business." "Councilman Mullen made the motion that Council appoint Councilman Cahill as the Vice Mayor. Motion was seconded by Councilperson White. Motion passed with Councilman Cahill, Mullen, Chevernak and Councilperson White voting for, Councilman Pressley voting against, and Councilman Evans not voting."

RELEVANT STATUTES

FOIA requires all public bodies to "give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda," 29 *Del. C.* §10004(e)(2).

FOIA authorizes a public body to hold a special meeting with only 24 hours' notice to the public but the notice must "include an explanation as to why" the normal seven days' notice "could not be given." *Id.* §10004(e)(3).

FOIA defines an "agenda" as "a general statement of the major issues expected to be

² According to your August 17, 2006 letter, you were scheduled for surgery that day which is why you did not attend the meeting.

discussed at a public meeting," 29 *Del. C.* §10001(f).

LEGAL ANALYSIS

A. Public Notice

The Town posted notice of the Council's May 18, 2006 special meeting at 2:30 p.m. on May 16, 2006 at least 24 hours in advance as required by FOIA for a special meeting. The Town did not explain in the agenda why it did not give seven days' notice. The Town contends that a special meeting to appoint a Vice Mayor and members of standing committees was necessary because of the "express urgency of the matter."

"Our Office has interpreted the shorter [24 hour] notice period allowed by FOIA for a special meeting to require some showing of 'exigent circumstances or compelling need' for the public body to hold a special meeting to discuss a matter of public business." *Att'y Gen. Op.* 05-IB05 (Feb. 22, 2005) (quoting *Att'y Gen. Op.* 00-IB07 (Apr. 28, 2000)).

In *Att'y Gen. Op.* 04-IB02 (Jan. 28, 2004), our Office determined that the city "has shown exigent circumstances or compelling need to hold a special meeting After the Chancery Court's decision on November 17, 2003, the City was faced with exigent circumstances which could not wait to be addressed until the next regular meeting of the City Council (scheduled for December 8, 2003). The City took immediate steps to place a temporary moratorium on the issuance of new rental permits so as not to violate state law." *But see Att'y Gen. Op.* 05-IB05 (no evidence in the record "to suggest that there were any exigent circumstances or compelling need for the Town Council to meet on three days' notice to discuss firing the Town Solicitor").

In *Att'y Gen. Op.* 03-IB16 (Aug. 8, 2003), the town gave three days' notice of a special

meeting to award a new contract for road improvements because the current contractor was not completing the work on time. The town contended it was necessary to hold the meeting with less than seven days' notice because of "concerns about public safety and legal liability." Our Office observed: "It might appear that the Council could have waited one week to take up the road repair issue to comply with the normal seven days' notice under FOIA." However, "since there is no pattern of the Town's using the special meeting exception to address matters of public business, we will accept the Town's representation about the urgency of the road improvement matter."

According to the Town, the municipal charter

provides that the Mayor shall act at the organizational meeting following the annual election to appoint the Vice-Mayor and Council Secretary. These appointments were not made at the organizational meeting on April 27, 2006 or at the subsequent meeting on May 1. Considerable discussion regarding these appointments took place at the May 15 meeting, . . . The Mayor's proposed appointment of another member of Council to be Vice-Mayor failed after which Council approved a motion to recommend that Councilman Cahill be appointed to the position of Vice-Mayor. Mayor Schaeffer declined to accept that recommendation announcing that he would not appoint anyone that evening.

The record shows that the Town Council had been at an impasse over the appointment of a Vice Mayor and standing committees for some time. While it might appear that the Council could have waited seven days to revisit the issue after the May 15, 2006 meeting, we will not second-guess the Town's belief that prompt action "was necessary for the good government of the town." The record shows that the Council discussed in public the Vice Mayor appointment at its May 15, 2006 regular meeting and publicly stated its intention to call a special meeting soon afterwards to address

that issue.³

We determine that FOIA authorized the Town Council to post the notice and agenda of the May 18, 2006 special meeting two days in advance. The Council violated FOIA, however, by not explaining in the notice why the Town could not give seven days' notice to the public.⁴ That is a technical violation and we do not believe any remediation is necessary. The Town is cautioned to comply with this requirement of FOIA in the future.

B. Agenda

The agenda for the Council's May 18, 2006 meeting did not mention the appointment of a Vice Mayor. The Town contends that FOIA permitted the Council to discuss that matter under the heading "Other Council Business." According to the Town, the Council considered "the matter still open from the prior meeting, and by simply leaving it open the appointment could be discussed further at any convenient meeting without being specifically listed on the agenda."

"An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns." *Att'y Gen. Op.* 05-IB11 (Apr. 11, 2005) (quoting *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att'y Gen. Op.* 97-IB20 (Oct. 20, 1997))).

³ In your letter dated August 17, 2006 you contend there was no urgency because the Town "had Standing Committees in place and they were functioning at the time the Special Meeting was called." Three members of the Council (who asked the Town Manager to schedule the meeting), however, felt that review of the committee membership required immediate attention after the recent elections.

⁴ We note that FOIA "requires only a reason, not a specific detailed factual basis, why the seven-day [notice] requirement could not be met." *Att'y Gen. Op.* 96-IB15 (May 10, 1996) (the notice lacked "any explanation" why seven-days' notice could not be given).

"While the statute requires only a 'general statement' of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfies neither the spirit nor the letter of the Freedom of Information Act to state the subject in such broad generalities as to fail to draw the public's attention to the fact that that specific important subject will be treated." *Ianni v. Department of Elections of New Castle County*, 1986 WL 9610, at p.5 (Del. Ch., Aug. 29, 1986).

In *Ianni*, the meeting notice listed for discussion "primary election." During the meeting, the department voted to open fewer polling stations in New Castle County in the primary elections. The Chancery Court held this notice did not adequately inform the public of an important matter of public business. "[A]ll that would have been required to satisfy this element of the statute would have been a statement that 'election district consolidation' or 'location of polling places' was to be treated." *Id.*

Our Office has determined that "a public body cannot 'use the general rubric of 'new business' or 'old business' to satisfy the requirements for an agenda under FOIA. . . . If the legislature intended that 'new business' or 'old business' without further detail would constitute sufficient notice to the public, then it would not have been necessary for the legislature to specifically authorize a public body to add items to the agenda 'which arise at the time of the public body's meeting.'" *Att'y Gen. Op.* 05-IB26 (Aug. 29, 2005) (quoting *Att'y Gen. Op.* 03-IB17 (July 31, 2003) (quoting 29 *Del. C.* §10004(e)(2)).

In *Att'y Gen. Op.* 03-IB17 (July 31, 2003), under the agenda item "New Business," the town council removed a member from office for missing meetings and appointed another person to replace him. Our Office determined that "New Business" did not "provide sufficient notice to the people of

a resolution calling for the forfeiture of a councilman's office."

We do not believe that listing "Other Council Business" in the agenda for the May 18, 2006 special meeting was sufficient to let the public know that the Council would address the Vice Mayor issue. We determine that the Town Council violated FOIA by not giving adequate notice in the agenda that the Council would discuss and appoint a Vice Mayor.

C. Remediation

When our Office finds a violation of the open meeting law, we may direct remediation if a public body has taken action on a matter affecting "substantial public rights." *Ianni*, 1986 WL 9610, at p.6. In *Ianni*, the Chancery Court held that the failure to notify the public that the county would reduce the number of polling stations "was not merely technical in nature but, in the circumstances, substantial. The policies sought to be fostered by [FOIA] are acutely involved in a matter of the kind in which an appointed public body makes decisions relative to the exercise of the right to vote." 1986 WL 9610, at p.4.

In *Att'y Gen. Op. 03-IB17*, our Office determined that the town council violated FOIA by not adequately disclosing in the agenda the forfeiture of a councilman's office. " Like *Ianni*, this case affects the fundamental right to vote and the important civil liberty of citizens to be governed by the representatives they elect. We do not see the Town's FOIA violation as technical. The action taken by the Town Council in declaring a councilman's office forfeited and voting to replace him with another person affected substantial public rights."

Under the Town Charter, the citizens do not elect the Vice Mayor who is appointed by the Council on the recommendation of the Mayor. The Town's agenda violation did not directly affect

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the right to vote, but we believe that it affected substantial public rights. The public has a right – enshrined in the open meeting law – to monitor and observe the process by which those officials who will govern them are selected. Citizens should have had clear notice before the Town filled the important position of Vice Mayor.

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CONCLUSION

For the foregoing reasons, we determine that the Town violated the open meeting requirements of FOIA by not adequately notifying the public in the agenda posted for the special meeting on May 18, 2006 that the Council would discuss and vote to appoint a Vice Mayor.

As remediation, we direct the Town to schedule a meeting within twenty (20) days of the date of this letter to hold a public meeting with at least seven days' notice under FOIA to discuss and vote anew on the appointment of a Vice Mayor. The Town Manager is directed to report to our Office in writing within five days after the Council has remediated.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED:

Lawrence W. Lewis, Esquire
State Solicitor

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cc: The Honorable Carl C. Danberg
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